

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACK A. WELLS and U.S. POSTAL SERVICE,
POST OFFICE, Chicago, IL

*Docket No. 99-266; Submitted on the Record;
Issued April 3, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether appellant met his burden of proof to establish that he has a permanent impairment of his lower extremities which entitles him to a schedule award; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

In April 1994 appellant, then a 39-year-old window clerk, filed an occupational disease claim alleging that he sustained injury to his feet due to his work duties. The Office accepted that appellant sustained bilateral plantar fasciitis, heel spurs and neuromas of his third interspaces. Appellant received compensation for periods of disability; he returned to full duty on July 17, 1995. On December 19, 1994 appellant underwent a bilateral neuroma excision and a bilateral fasciotomy release; the procedure was authorized by the Office.

Appellant later alleged that he was entitled to a schedule award for permanent impairment of his lower extremities. In August 1995 Dr. Vincent A. Perns, an attending podiatrist, performed an evaluation and determined that appellant did not have a permanent impairment of his lower extremities which would entitle him to a schedule award. Dr. Perns noted that appellant had mild postoperative pain in his feet, but did not have any sensory loss, range of motion loss or atrophy in his feet or ankles. In a letter dated November 28, 1995, an Office medical consultant determined that the evidence did not show that appellant has a permanent impairment of his lower extremities which would entitle him to a schedule award. By decision dated November 26, 1996, the Office denied appellant's claim on the grounds that the evidence did not show that he has a permanent impairment, which would entitle him to a schedule award.

In March 1997 appellant was evaluated by Dr. Alfred A. Akkeron, a physician specializing in orthopedic surgery, who served as an Office referral physician. In a report dated March 20, 1997, Dr. Akkeron determined that appellant did not have any permanent impairment

of his lower extremities. He noted that appellant complained of pain in his feet, but that he did not exhibit any sensory loss or range of motion loss upon examination. In a report dated April 15, 1997, another Office medical consultant determined that the evidence did not show appellant has a permanent impairment of his lower extremities which would entitle him to a schedule award. Appellant requested reconsideration of his claim and, by decision dated April 16, 1997, the Office denied modification of its November 26, 1996 decision.

Appellant then submitted a February 9, 1998 report, in which Dr. Perns stated, "He suffers from chronic heel pain, in part due to his scar tissue and adhesion build up throughout the heels. He also has diminished sensation in his fourth digit bilaterally secondary to a neuroma excision." Appellant requested reconsideration of his claim and, by decision dated April 30, 1998, the Office denied modification of its earlier decisions.

By letter dated June 30, 1998, appellant requested reconsideration of his claim and, by letter dated July 27, 1998, the Office provided appellant 30 days to submit additional medical evidence. By decision dated September 23, 1998, the Office denied appellant's request for merit review noting that appellant had not submitted any evidence in support of his reconsideration request.

Considering the second issue first, the Board finds that the case is not in posture for decision.

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,¹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.² To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his application for review within one year of the date of that decision.³ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.⁴

The Act provides that the Office shall determine and make findings of fact in making an award for or against payment of compensation after considering the claim presented by the employee and after completing such investigation as the Office considers necessary with respect to the claim.⁵ Since the Board's jurisdiction of a case is limited to reviewing that evidence

¹ 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

² 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

³ 20 C.F.R. § 10.138(b)(2).

⁴ *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

⁵ 5 U.S.C. § 8124(a)(2); 20 C.F.R. § 10.130.

which is before the Office at the time of its decision,⁶ it is necessary that the Office review all evidence submitted by a claimant and received by the Office prior to issuance of its decision. As the Board's decisions are final as to the subject matter appealed,⁷ it is crucial that all evidence relevant to that subject matter, which was properly submitted to the Office prior to the time of issuance of its decision be addressed by the Office.⁸

In the present case, the Office did not review evidence received prior to the issuance of its September 23, 1998 decision denying appellant's request for merit review, *i.e.*, an August 11, 1998 report of Dr. Akkeron, a physician specializing in orthopedic surgery who served as an Office referral physician.⁹ This report was received by the Office on August 17, 1998, a time after appellant's June 30, 1998 reconsideration request and prior to the issuance of the Office's September 23, 1998 decision. The Office improperly indicated in its September 23, 1998 decision that appellant had not submitted any evidence in support of his reconsideration request. The Board, therefore, must set aside the decision dated September 23, 1998 and remand the case so that the Office may fully consider the evidence that was properly submitted by appellant prior to evaluating his request for merit review under the appropriate standards noted above. Following such further consideration and after such further development as it deems necessary, the Office shall issue an appropriate decision.¹⁰

⁶ See 20 C.F.R. § 501.2(c).

⁷ 20 C.F.R. § 501.6(c).

⁸ *William A. Couch*, 41 ECAB 548, 553 (1990).

⁹ It is unclear from the record whether the Office referred appellant to Dr. Akkeron for production of the August 11, 1998 report or whether appellant revisited Dr. Akkeron on his own initiative. In his August 11, 1998 report, Dr. Akkeron stated that appellant did not have a permanent impairment of his lower extremities, but he also noted irregularities such as bilateral decreased sensation in the web space of the third and fourth toes, the lateral aspect of the fourth toe, and the medial aspect of the third toe.

¹⁰ Given the Board's disposition of the nonmerit issue of the present case, it is premature for it to consider the merit issue.

The decision of the Office of Workers' Compensation Programs dated September 23, 1998 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board.

Dated, Washington, D.C.
April 3, 2000

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member